

Public Lands Preservation Act Codifies EOEEA Policy and Article 97 “No Net Loss”

Gregor I. McGregor, Esq.



MCGREGOR LEGERE & STEVENS PC

MASSACHUSETTS ENVIRONMENTAL LAWYERS
FOR OVER 45 YEARS

MMLA Annual Meeting 2023

Devens Enterprise Center

October 13, 2023

McGregor Legere & Stevens PC
15 Court Square, Suite 660
Boston, MA 02108
617-338-6464
www.mcgregorlaw.com

©2023

The author thanks his Associate Caroline Smith

Parklands and the Public Trust



Introduction

Article 97 of Amendments to the Massachusetts Constitution

- Codifies the Public Trust Doctrine in Massachusetts
- Requires a super-majority passage of a bill for of any proposed disposition of or change in use of dedicated parks and other natural resource lands and water areas, broadly defined.
- 2/3 roll call vote of both House and Senate on passage of a bill in order to transfer or change the use of certain state, county, or local public lands originally taken or acquired for natural resource proposes.
 - Also covers such lands that have been later dedicated to these purposes
 - About 16 to 20 Article 97 bills pass the Legislature to be signed by the Governor annually.
 - Typically about state or municipal changes or exchanges involving parklands, forests, open space, historic sites, reservations, sanctuaries, or water supply land for some public project, private development, city or town building, residential project, or commercial facility.

Parklands and the Public Trust



Article 97 Land Disposition Policy, Feb. 19, 1998

Purpose: “Ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions.”

- Policy provides an extensive internal review process for potential dispositions
- EOEEA will not support a disposition unless sponsoring agency establishes “exceptional circumstances exist” and certain conditions will be met.

Codified by the Public Lands Preservation Act (PLPA)

An Act Preserving Open Space in the Commonwealth, known as the Public Lands Preservation Act (PLPA), took effect February 15, 2023, establishing a process and criteria for submitting a proposal to EOEEA and an “Article 97 Bill” to the Legislature to authorize a new use and/or disposition, called an “Article 97 Action” affecting “Article 97 land.”

Parklands and the Public Trust



Public Lands Preservation Act (PLPA) Core Provisions

Key requirements for Article 97 Actions are (i) public and EOEEA notification; (ii) an alternatives analysis; and (iii) identification and dedication of replacement land to Article 97 purposes.

In certain cases, the replacement land requirement may be waived or modified by the EOEEA Secretary, or provision of funding may be authorized in lieu of replacement land.

EOEEA reviews and publishes a public notice, needs assessment, alternatives analysis, natural resource assessment, financial appraisal, any proposed waiver or modification of the rules, the designated replacement land, easement, or interest, any proposed funding-in-lieu of that replacement, approvals by public agencies involved, and authorizing legislation to be submitted, which must be accompanied by EOEEA findings.

Parklands and the Public Trust



Other Protections for Public Parks, Playgrounds, Forests and Reservations

Specific resources are governed by individual statutes—many state, county and municipal public lands municipalities are managed under these laws.

- **M.G.L. c. 45, §§ 1-13, city and town parks**
- **M.G.L. c. 45, § 3, parklands**
- **M.G.L. c. 45, § 14, playgrounds**
- **M.G.L. c. 45, § 19, public domain**
- **M.G.L. c. 45, § 21, city and town forests**
- **M.G.L. c. 45, § 23A-23C, shore reservations**
- **M.G.L. c. 92, §§ 33-59, urban parks and recreation lands**
- **M.G.L. c. 132, state forests**
- **M.G.L. c. 132A, §§ 1-18, state parks**

Public Lands Preservation Act



An Act Preserving Open Space in the Commonwealth, known as the Public Lands Preservation Act (PLPA), took effect February 15, 2023, establishing a process and criteria for submitting an “Article 97 bill” to the Legislature to authorize a new use and/or disposition (“Article 97 Action”) affecting “Article 97 Land.”

Article 97 lands are those areas of state, regional or local government or authorities and various kinds of districts, originally taken or acquired, or subsequently dedicated, for natural resource purposes, broadly defined. They typically are called parklands but include other types of properties.

Public and private landowners, agency officials, property managers, land use planners, facility operators, boards and agencies, and legal counsel involved in transactions, permitting and authorizing legislation should be familiar with the new PLPA obligations.

Public Lands Preservation Act



Studies and anecdotal evidence over the years showed that roughly 16 to 20 Article 97 bills passed the Legislature and were signed by the Governor each year. Typically, they dealt with municipal changes or exchanges involving parkland, forest, open space, or water supply land for some public project, private development, city or town building, residential project, etc.

Other typical bills have been about state, county, authority, or governmental districts' changes or exchanges involving parks, forests, reservations, monuments, historic sites, water supply lands, reservoirs, lakes, rivers, or ocean properties.

PLPA was introduced over 20 years ago to strengthen and codify the EOEEA-announced goal of No Net Loss, which had been set by administrative policy, which stated that Article 97 land before transfer or change of use must be replaced with land of equivalent financial and natural resource value.

In recent years EOEEA issued a set of Appraisal standards and a Land Disposition Policy, which made the process more formal for those bills which came to the attention of EOEEA, or for those projects which proactively sought clearance by the agency in order to simplify and streamline the legislative process and approval by the Governor.

Public Lands Preservation Act



PLPA's core provisions provide clarity, consistency, transparency, and compliance measures to achieve No Net Loss by building on that existing administrative process requiring replacement of Article 97 public land to be transferred or used for a new purpose.

A provision added to PLPA before passage permits and provides specific rules for what are supposed to be limited cases where cash payments or other financial arrangements are offered in lieu of designating replacement land, easement, or other real property interest.

PLPA gives a major role for the Executive Office of Energy and Environmental Affairs (EOEEA), which is to review and publish an a public notice, needs assessment, alternatives analysis, natural resource assessment, financial appraisal, any proposed waiver or modification of the rules, the designated replacement land, easement, or interest, any proposed funding-in-lieu of that replacement, approvals by public agencies involved, and the authorizing legislation to be submitted, which is to be accompanied by some of these and EOEEA findings.

Public Lands Preservation Act



PLPA took effect 90 days after enactment on November 17, 2022. Since PLPA did not have an emergency preamble, it was effective 90 days later on February 15, 2023.

PLPA appears to apply to any transfer or new use which had NOT been authorized already by the enactment of an Article 97 bill (assuming it met the existing EOEEA Land Acquisition Appraisals standards and EOEEA Article 97 Land Disposition Policy).

The EOEEA regulations mandated by PLPA, now in process and due 18 months in August 2024, might deal with vesting or staged effectiveness for projects caught in the pipeline. Even before the EOEEA Regulations in 18 months, the basics apply to Article 97 lands in accord with a comprehensive Guidance EOEEA issued in February 2023.

Public Lands Preservation Act



EOEEA has created a “PLPA Portal” to streamline the new PLPA submission process by providing an online tool to file required documents and post alternative analyses and other reports, facilitating compliance with the PLPA’s public notice requirement.

The Portal presents the existing EOEEA “Land Acquisition Policy—Appraisals”, dated January 2015, and the EEA “Article 97 Land Disposition Policy”, dated February 1998, also known as the No Net Loss policy, noting that a new draft of the Policy is being prepared to be consistent with the new Act.

Proponents must use the PLPA Portal to notify EOEEA of proposed Article 97 Actions and to make submissions.

Public Lands Preservation Act



Prior to making any submission, proponents must engage in discussions with the public entity with care and control of the involved Article 97 land.

Submissions via the PLPA Portal must include information needed for EEA, the public entity that has care and control of the Article 97 land, and the Legislature to review proposed Article 97 legislation, such as documentation of the location and ownership of the affected and replacement land.

The information required will vary based on the type of project and the materials available to the proponent. The Portal guides users through a series of fields that gather required information.

Public Lands Preservation Act



EEA will review submissions to determine consistency with the PLPA and with the Article 97 existing and eventual expected new Policy regulations.

Based on this review, the Secretary will make requested determinations and findings on any waivers, modifications, and in lieu funding proposals.

EEA will post on the PLPA website all such determinations and findings and any waivers to be reported to the Legislature.

In the PLPA Portal is a document entitled “Guidance on Public Lands Preservation Act Implementation.” This document is intended to aid the public in understanding and complying with the new law.

It states, however, that this Guidance is not to be construed as encouraging the use for another purpose or disposition of land protected by Article 97, it is not to be relied on, does not create any enforceable right, and cannot be construed to create a right to judicial review.

Nonetheless, it says EOEEA and its agencies will not authorize, approve or support a change in use or disposition unless in accordance with the Article 97 Policy.

Public Lands Preservation Act



The Guidance describes how PLPA applies to any change in use or disposition of land or interests in land subject to Article 97 and specifies what qualifies as an Article 97 Action:

1. transfer or conveyance of ownership or another property interest, whether by deed, easement, lease or any other instrument effectuating such transfer or conveyance;
2. change in physical or legal control; or
3. change in use of the land.

EEA does not consider the issuance of a revocable permit or license of limited duration a disposition of land subject to Article 97 or the PLPA, however, provided that:

1. no interest in land is transferred to the permittee or licensee, and
2. the permit or license does not authorize a change in use of the land.

Public Lands Preservation Act



EOEEA offers a consultation method for those who wonder. EOEEA policy, legal, and legislative staff will collaboratively answer questions regarding Article 97 Actions. A dedicated email address, plpa@mass.gov has been established to accept requests for assistance.

All PLPA related inquiries are properly directed to this address including: questions on the use of the PLPA Portal, the application itself, the status of a submission, or the availability of information on PLPA submissions; policy oriented or substantive questions about Article 97; and technical questions around the proper drafting of PLPA legislation.

Public Lands Preservation Act



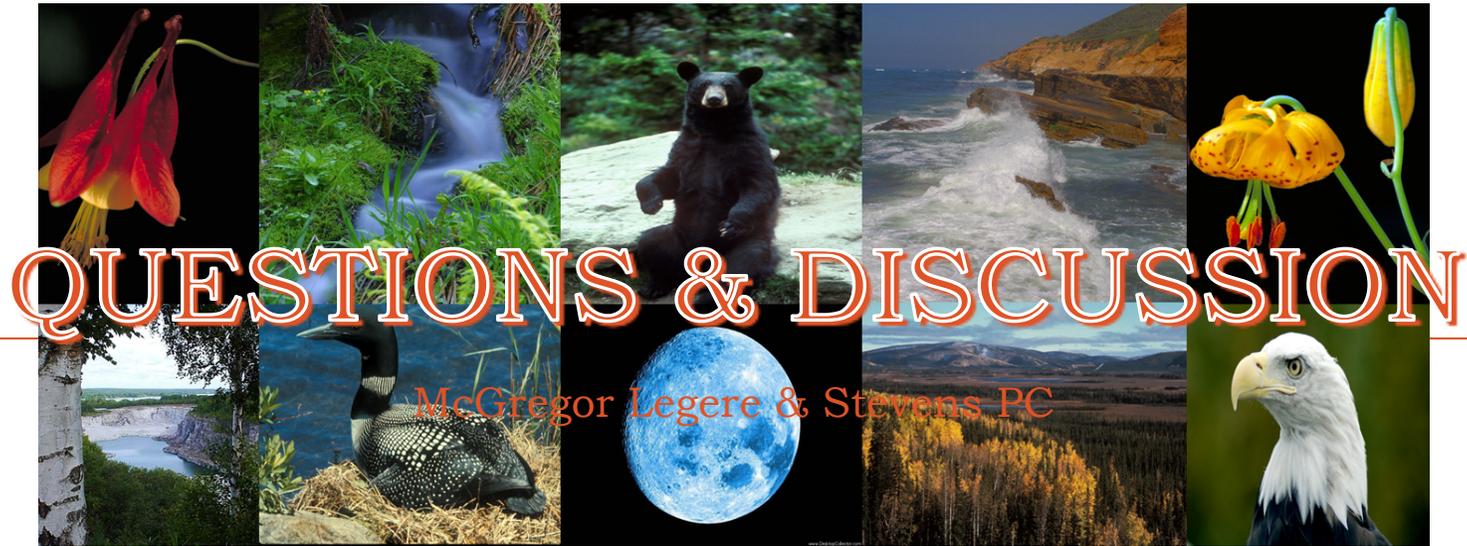
Summary

Article 97 of the Amendments to the Massachusetts Constitution, approved by the voters in 1972, established a right to a clean environment including its natural, scenic, historical, and aesthetic qualities for the citizens of the Commonwealth.

Article 97 also declared the conservation of natural resources to be a public purpose, and provided that land, easements, or real property interests protected by Article 97 shall not be used for other purposes or disposed of without a 2/3 roll call vote of both houses of the Legislature.

This is a super-majority legislative check on changes of use or transfers of Article 97 protected properties. Over the years EOEEA has augmented Article 97 with its review policy of “no net loss” of such land and water areas. Now these procedures and standards have been codified in the PLPA.

Utilize the EOEEA Guidelines and Portal for proposals and submittals on Article 97 Actions affecting Article 97 Lands. Stay tuned for the EOEEA to issue soon the initial form to use to start the process and to promulgate the PLPA regulations due August 2024.



QUESTIONS & DISCUSSION

McGregor Legere & Stevens PC